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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

RICHARD L. COLBERT
COLBERT & WILBERT, PLLC
108 FOURTH AVENUE SOUTH
SUITE 209
FRANKLIN, TN 37064
(615) 790-6610

THOMAS R. MCCOY
VANDERBILT LAW SCHOOL
131 21ST AVENUE, SUITE 207
NASHVILLE, TN 37203
(615) 322-2711

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

QUESTION PRESENTED

The Tennessee Secondary School Athletic Association is a voluntary association, composed primarily of public schools, which adopts rules governing athletic competition between its members. Brentwood Academy is a private school that voluntarily chose to join TSSAA and agreed to abide by its rules, but now claims a First Amendment right to continue competing while violating TSSAA's rule against the use of "undue influence" in recruiting students for athletic purposes. The Sixth Circuit agreed, reasoning that Brentwood's voluntary agreement is irrelevant to the constitutional analysis and declining to recognize any substantial state interest in fair and level athletic competition. The question presented in this case is:

Whether the Sixth Circuit correctly held, in conflict with decisions of this Court and other courts of appeals, that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed contractual penalties for violations of the recruiting rule that Brentwood agreed to follow.

RULE 29.6 STATEMENT

Petitioner Tennessee Secondary School Athletic Association does not have a parent corporation, and no publicly held company owns 10% or more of Tennessee Secondary School Athletic Association's stock.

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OPINIONS BELOW

The Sixth Circuit's earlier panel opinion is reported at 262 F.3d 543 (Pet. App. 1-24). The district court's opinion on remand is reported at 304 F. Supp. 2d 981 (Pet. App. 25-77). The Sixth Circuit's subsequent opinion is reported at 442 F.3d 410 (Pet. App. 78 -153).

JURISDICTION

The Sixth Circuit denied TSSAA's petition for rehearing and rehearing *en banc* on June 27, 2006 (Pet. App. 154-155). The petition for a writ of certiorari was filed on September 25, 2006, and was granted on January 5, 2007. 127 S. Ct. 852. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech." The Fourteenth Amendment to the Constitution provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association's ("TSSAA") member schools have agreed that one of the rules for their high school athletic league should be a mutual agreement not to use "undue influence ... to secure or to retain a student for athletic purposes." JA 181.[1] High school athletic associations in every other state have similar rules, because there is a broad consensus among educators that recruiting for athletics harms students and undermines the educational purposes of high school sports. The recruiting rule also plays an important role in maintaining a fair and level playing field. It may limit "speech" in a sense, but so does the rule that a coach too vigorously protesting a referee's call will be ejected. Respondent Brentwood

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[1] "JA" refers to the joint appendix filed in this Court. "CAJA" refers to the joint appendix filed in the court of appeals. "Pet. App." refers to the petitioner's appendix accompanying the petition for certiorari.

Academy voluntarily chose to join TSSAA and promised to respect its rules, and then committed several clear violations of the recruiting rule. After TSSAA imposed a sanction, Brentwood initiated a decade of constitutional litigation claiming that its violations should have been treated as a case of "no harm, no foul." It claims, in essence, to have a constitutional right to compete in TSSAA's tournaments without following the rules that set the terms of competition, and victory, for others.

The Sixth Circuit found a First Amendment violation here only by making several fundamental errors. First, it held that the voluntary and contractual nature of Brentwood's relationship with TSSAA is irrelevant to the constitutional analysis—*i.e.*, that there is no difference between the rules of a voluntary athletic league and "time, place, and manner" restrictions on speech imposed without consent on the general public. Second, the court held that TSSAA has no substantial governmental interest in protecting fairness or competitive balance in the athletic competition it oversees. Third, even after acknowledging that TSSAA's recruiting rule serves important state interests in general, the Sixth Circuit wrongly second-guessed TSSAA's judgment about whether enforcement was merited on these particular facts.

The Sixth Circuit also held that Brentwood received inadequate notice of certain evidence against it, in violation of procedural due process. Brentwood received exactly the (extensive) notice it was entitled to under TSSAA's constitution and the membership contract, and is entitled to no more. The court's due process reasoning is essentially a back door holding that Brentwood was entitled to decisionmakers who knew nothing about the facts not elicited at the hearing itself. That is contrary to settled law.

The Sixth Circuit's misinterpretation of constitutional principles injects federal courts into second-guessing the internal operations of voluntary athletic associations, a role for which federal courts are particularly miscast. And, on a practical level, it threatens to end voluntary athletic

competition between public and private schools.

The Role of TSSAA

Interscholastic athletic competition cannot be conducted effectively through a system of ad-hoc pickup games. It requires a common set of rules to establish, define, and coordinate competition. This Court held in *Brentwood Academy v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"), that TSSAA should be treated as a state actor due to the involvement of public school officials in the organization. This Court nevertheless did not question the following facts concerning TSSAA's structure and activities.

TSSAA is a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics. *Id.*; CAJA 119-20. TSSAA's members are predominantly public schools, *Brentwood I*, 531 U.S. at 291, but private schools that agree to abide by TSSAA's constitution and bylaws are also permitted to join. Members have the common goal of participating in athletic competition, but can have antagonistic and adversarial interests. Not all schools in Tennessee subscribe to TSSAA's particular philosophy. Members have terminated their relationships with TSSAA to pursue different objectives, and many private schools in Tennessee join other athletic associations with different values and different rules. JA 432-34, 450.

TSSAA's only authority over its members derives from each member's annual, voluntary decision to participate in TSSAA by executing a membership contract. *Brentwood I*, 531 U.S. at 291 ("[n]o school is forced to join"); Pet. App. 79 ("TSSAA is a voluntary association"); JA 434-35, 449-50. By executing that contract, members agree to abide by TSSAA's bylaws and grant TSSAA the authority "to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause." JA 147. No Tennessee law requires any school, public or private, to engage in interscholastic

athletics at all, much less to join TSSAA. The Tennessee statutes pertaining to public education are silent with regard to interscholastic athletic competition.

TSSAA is largely run by its executive director and is overseen by a Legislative Council that adopts rules for the organization, and a Board of Control that enforces the rules. The Legislative Council and Board of Control each consist of nine members who must be high school principals, vice principals, or school administrators from either public or private schools. *Brentwood I*, 531 U.S. at 291. The Board members are elected by popular vote of TSSAA members from nine athletic districts across the state and represent the interests of all schools—public and private—within their district. Although TSSAA's constitution and bylaws do not provide for additional Board members, TSSAA's practice has been to allow non-voting representatives from seven different organizations, JA 272, one of which is the State Board of Education, *Brentwood I*, 531 U.S. at 300, to attend and participate at meetings if they choose. No ex officio member attended either of Brentwood's hearings or participated in TSSAA's deliberations. CAJA 3084.

TSSAA's operating budget includes approximately $1.6 million in annual gross receipts. The Sixth Circuit found, and this Court did not dispute, that "TSSAA receives no funding from the state." *Brentwood Acad. v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999). Instead, TSSAA's funds are derived primarily from gate receipts of tournaments which TSSAA sponsors for its member schools. *Brentwood I*, 531 U.S. at 291. Only 4% of TSSAA's annual budget comes from the membership dues paid by its public and private member schools. JA 284, 281. Like any other private entity, TSSAA must contract with the state to use state-owned facilities, and it must register with the Tennessee Department of Revenue and be subject to the same amusement and sales taxes assessed on private taxpayers. JA 281, 284-85.

Brentwood's Voluntary Participation in TSSAA

Respondent Brentwood Academy is a small private

academy with a prominent athletic program. CAJA 118. Since joining TSSAA for the first time in 1972, Brentwood has won nine TSSAA state football championships, usually competing against much larger schools. CAJA 1155. Brentwood has always acknowledged that its relationship with TSSAA is contractual in nature. Its briefs to the district court invoked contract law and emphasized that "[a]s a member of TSSAA, Brentwood Academy and other member schools have certain contract rights. Among those rights is the right to participate fully in the activities of the TSSAA unless there is some cause for a change in status." Brentwood Mem. at 60, No. 3:97-1249, Doc. No. 28 (M.D. Tenn. June 1, 1998). Brentwood has likewise acknowledged that joining TSSAA is an entirely voluntary choice. CAJA 1406, 574. Its Headmaster Emeritus Bill Brown testified:

> Q. All right. Now Brentwood Academy as of 1996 and '97 and throughout your tenure as headmaster was a voluntary member of TSSAA, correct?
>
> A. Yes, sir.
>
> *****
>
> Q. And Brentwood Academy was not under any compulsion to join, it did so voluntarily, correct?
>
> A. Yes, sir.
>
> Q. All right. And when Brentwood Academy joined TSSAA, it agreed to abide by the rules and decisions of TSSAA, each year, right?
>
> A. Yes, sir.

JA 448-49. Current Headmaster Curt Masters confirmed that Brentwood decides each year whether or not to join TSSAA. JA 445. When asked whether Brentwood was free to leave TSSAA if it enacted a rule that conflicted with Brentwood's mission, Masters replied "yes." JA 446.

TSSAA's Recruiting Rule

TSSAA's bylaws contain a "recruiting rule" that prohibits "the use of undue influence ... to secure or retain a student for athletic purposes...." JA 181. The bylaws contain several pages of guidance that explain the rule's scope and application. JA 181-85. For example, the

guidance warns that "a coach may not contact a student or his or her parents prior to his enrollment in the school," and cites as an example of prohibited conduct "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete...." JA 181-82. The bylaws also define "enrolled" as having "attended 3 days of school." JA 182; CAJA 1918.

High school athletic associations in every other state all have similar recruiting prohibitions. Br. Nat. Fed. of State High Sch. Ass'ns ("NFHS") at 2. And TSSAA's evidence at trial confirmed that the rule advances three important goals: (1) preventing the exploitation of children; (2) ensuring that athletics remain secondary to academics; and (3) fostering a level playing field among its participating schools.

First, sports recruiting of young athletes has led to a pattern of abuses in the past. CAJA 1665-67, 1338-39. Four nationally renowned experts confirmed at trial that the recruiting rule serves to guard against exploitation of children. CAJA 1748-51, 1564, 1658, 1338. Indeed, Brentwood's own expert acknowledged that preventing such exploitation is a compelling interest. CAJA 1205.

Second, the rule helps to preserve the primacy of academics over athletics. CAJA 1564-65, 657, 706. Otherwise the ills that have befallen many Division I colleges with elite athletic programs would surface at the high school level, and pose an even greater threat of harm to students. CAJA 1569, 1604, 1609, 1666, 1338, 1351. Even Brentwood's Headmaster Emeritus Bill Brown conceded that athletic recruiting is contrary to the purposes of high school sports and education, and should be prohibited. CAJA 607, 614. Brown insisted at trial that all athletic recruiting should be prohibited. *Id.*

Third, TSSAA's recruiting rule promotes fair and balanced athletic competition. Many different types of schools have come together to compete through TSSAA, and the entire enterprise depends on the ability to establish

a reasonably level playing field. The evidence demonstrated that TSSAA's recruiting rule is designed to achieve that goal. CAJA 1728-32, 1564-65, 1571-74, 1306, 1311-12, 1324, 1086, 1163-65, 1636-38, 606-07, 1350-51, 1102. Brentwood Headmaster Emeritus Brown acknowledged that the recruiting rule protects a level of fairness in athletic competition that otherwise could not exist, CAJA 605-06, 615, and that, without rules to prevent athletic recruiting, private schools that are not restrained by geographic attendance zones or dependent on limited tax revenues would have unfair advantages over public schools. CAJA 615. The recruiting rule is therefore necessary to enable public schools and private schools to compete fairly within the same organization. Witnesses also confirmed that both the perception and reality of fairness and competitive balance are essential to the educational goals of high school athletics. As TSSAA expert witness Jack Roberts testified:

> If you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. All who participate want a fair chance to succeed .... The team doesn't want to be humiliated week after week by teams that are much more loaded in talent and powerful. ... There won't be as many youngsters coming out for the team. When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people.

JA 405-06.

Brentwood's Violation of the Recruiting Rule

In 1997, TSSAA received allegations about recruiting misconduct by individuals associated with Brentwood, including its head football coach Carlton Flatt and a booster named Bart King. CAJA 1025, 1437. Between May 30 and July 29, 1997, TSSAA Executive Director Ronnie Carter exchanged a series of letters and phone calls with coach Flatt and Headmaster Brown about those violations, and Carter and one of his assistants met personally with both Flatt and Brown. JA 120-33, 204-29, 238-44.

On July 15, 1997, Brentwood provided TSSAA a copy of a letter Coach Flatt had sent to a dozen eighth-grade boys enrolled at other middle schools inviting them to attend spring football practice at Brentwood. JA 119. Brentwood acknowledged that Coach Flatt had followed up those letters with personal telephone calls to the home of each boy. JA 219-20. The boys had indicated an intention to attend Brentwood the next fall, but were not yet "enrolled" at Brentwood as defined in the bylaws (a definition of which Brentwood's admissions director testified she was aware, CAJA 558). Every year some students change their minds before matriculating (including one of the boys who was the subject of these recruiting allegations), and students who have not yet received their financial aid package do not even forfeit a deposit. CAJA 561-63, 582-84, 591.

Numerous athletic officials and experts explained at trial why this invitation to spring practice represented a form of recruitment that would tend to unduly influence the boys who received it. CAJA 1741-42, 1576-79, 1673, 1345-47, 1064. Coach Flatt's letter effectively treated twelve boys as his own players, even though they were not yet Brentwood students, by describing himself as "Your Coach," and by enticing them with the opportunity to be given "equipment" for "your new team." JA 119; CAJA 1742 (expert testifying to powerful impact on students of being enticed with new equipment and uniforms). Moreover, Flatt's letter told the students attending other schools that "I do feel that getting involved as soon as possible would definitely be to your advantage," JA 119, which sent the message that the opportunity to play in the future could depend on attendance at Brentwood's spring practice. CAJA 1577, 1347. Such suggestions tend to have great effect because of the sway that coaches have over young student athletes. CAJA 1166-67, 1741. Coach Flatt himself acknowledged the influence his letters had. JA 301-02. Twelve eighth-grade boys attending other schools received Coach Flatt's letters and calls. All twelve attended at least some of Brentwood's spring football practices, some missing other activities at

the schools they were attending. Pet. App. 84; CAJA 527.[2]

TSSAA's Internal Hearing Procedures

TSSAA's constitution provides that a school charged with violating TSSAA regulations "shall be notified of such charges," and that "if a hearing is desired by the school involved ... provisions will then be made for such hearing." JA 141. But the constitution does not require TSSAA to present all of its evidence of infractions on the record in a public hearing. It only requires that "a member school shall not be suspended from membership without first being given the opportunity *to present its case* at a hearing ... [which] shall be conducted by the Executive Director in the presence of two or more members of the TSSAA Board of Control." *Id.* (emphasis added). Finally, "any decision of the Executive Director may be appealed to the Board of Control." *Id.*

The courts below did not make any finding that TSSAA's investigation and adjudication failed to comply with the procedures established in its constitution and bylaws and agreed upon by all members. Nor could they have done so. The investigation began with written correspondence between TSSAA's executive director Ronnie Carter and Brentwood. Pet. App. 83-84. This correspondence put Brentwood on notice of the various issues and allegations with which TSSAA was concerned, and gave Brentwood an opportunity to respond to each issue in writing. *See, e.g.*, JA 121, 124-33, 204-29. This correspondence included repeated, express references to Bart King, who was alleged to have been recruiting children—including a highly sought-after recruit named Jacques Curry—on Brentwood's behalf. JA 121, 126, 207-

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[2] Another concern animating the recruiting rule and its application in such circumstances is that, because students have not yet attended their new high school, their financial aid packages typically will not yet have been finalized. Soliciting middle school students to attend spring practice gives schools incentives to screen students in football practice, and make financial aid decisions accordingly. One witness, an expert in sports ethics, characterized the invitations as "try out" invitations. CAJA 1749.

210, 218-27. It also included lengthy, written responses from Brentwood that included discussion of King. JA 120-23, 128-33, 212-29. On July 29, 1997, Executive Director Carter made an initial determination based on Brentwood's written submissions that Brentwood had violated the recruiting rule and the TSSAA limitation on off-season practice. That assessment was based on all of the incidents discussed by the parties, including the activities of King. JA 238-44. Brentwood's football and basketball teams were excluded from tournament play for two years, other teams were excluded from tournaments for one year, and the school was placed on probation and "fined" $3,000. JA 243. As a result of his recruitment by King, Jacques Curry was declared ineligible to participate in athletics at Brentwood. Three other students were also declared ineligible because of recruiting violations. *Id.*

With the aid of counsel, and in accordance with TSSAA's bylaws, Brentwood then pursued a hearing before Carter and an advisory panel of three TSSAA Board of Control members. At this August 13, 1997 hearing, Brentwood presented a bound set of twenty-five exhibits that contained documents and sworn statements from witnesses, including an affidavit from King. Brentwood's attorney made a lengthy presentation with testimony and argument addressing each violation. *E.g.*, JA 245-53. Following that hearing, Carter modified his initial decision, but Curry and two other students remained ineligible. JA 254-58.

Brentwood then pursued a *de novo* appeal under TSSAA bylaws to the entire TSSAA Board of Control on August 23, 1997. Again represented by counsel, Brentwood made a lengthy presentation that included live testimony of witnesses and the same sworn statements addressing each violation, including the violations that pertained to King. CAJA 3084-3186. Brentwood's attorney presented an affidavit from King and a sworn statement from Jacques Curry about Bart King. CAJA 2812-14, 2967-71. Curry offered live testimony about his relationship with King. CAJA 3159-64. Brentwood's attorney also brought Mr.

King in person to the hearing but did not call him to testify. CAJA 1477, 1479. Immediately after Curry's testimony about King, Brentwood's attorney concluded:

> Mr. Nebel: Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks.
>
> By the way, we have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him.
>
> Mr. Carter: No.
>
> Mr. Nebel: No. All right.

JA 267. Brentwood's attorney acknowledged having had ample opportunity to prepare for the hearing, and testified that he was not prevented from presenting anything he wished to present. JA 396-401.

After hearing Brentwood's arguments, the Board of Control issued a new and final decision. The Board of Control found that Brentwood: (1) violated the recruiting rule as a result of Coach Flatt's letters and calls; (2) violated the recruiting rule by giving free tickets to a Brentwood football game; and (3) violated the practice rule in boys' basketball. JA 269-71. Each finding was based upon information that Brentwood supplied to TSSAA. It placed Brentwood's athletic program on probation for four years, excluded the boys' basketball and football teams from TSSAA tournament play-offs for two years (regular season play was unaffected), and assessed a $3,000 "fine." (TSSAA bylaws do not provide a mechanism to compel payment, and to date the "fine" has not been paid. CAJA 867.) The Board reinstated Curry's eligibility, which had previously been revoked due to King's alleged recruiting. JA 271.

Brentwood felt the punishment was too severe, and filed this lawsuit alleging that the recruiting rule violated its First Amendment rights and that TSSAA's enforcement

violated both substantive and procedural due process.[3]

Judicial Proceedings

1. On July 29, 1998, the district court granted partial summary judgment to Brentwood and permanently enjoined TSSAA from continued enforcement of the recruiting rule. The district court held that the recruiting rule was unconstitutionally vague and was a content-based restriction on speech that failed strict scrutiny. *Brentwood Acad. v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The Sixth Circuit reversed, ruling that TSSAA did not act under color of state law. *Brentwood Acad.*, 180 F.3d 758. This Court reversed, concluding in a 5-4 decision that TSSAA was a state actor because of its "entwinement" with the State Board of Education and public schools. *Brentwood I*, 531 U.S. 288.

2. On remand to the Sixth Circuit, TSSAA argued that because of the contractual relationship between Brentwood and TSSAA, the *Pickering-Connick-Umbehr* line of cases, which governs retaliation against government employees or contractors because of speech, provided the appropriate analytical framework here. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996). Under that standard, TSSAA argued that Brentwood's speech was not on a matter of public concern, and that application of the recruiting rule to Brentwood was reasonable in light of the rule's legitimate objectives.

The Sixth Circuit disagreed. It held that the voluntary and contractual nature of the relationship between

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[3] Brentwood is also asserting an equal protection claim, as well as an antitrust claim that is premised on the theory that a voluntary athletic association violates the Sherman Act if it creates different divisions for its participants. CAJA 270-72. The district court dismissed the antitrust claim on immunity grounds, ruling that the facts underlying this Court's decision that TSSAA was a state actor supported the conclusion that it was entitled to immunity under *Parker v. Brown*, 317 U.S. 341 (1943). CAJA 411-12. The Sixth Circuit reversed the immunity ruling, leaving the equal protection and antitrust claims still active. Pet. App. 129.

Brentwood and TSSAA was relevant only to waiver—and that Brentwood had not specifically waived its right to file a First Amendment lawsuit. Pet. App. 7-8. The court briefly considered the potential relevance of *Umbehr* and *Pickering*, but held that the recruiting rule should instead be analyzed as a "time, place, and manner" restriction on speech subject to intermediate scrutiny. It reasoned that because TSSAA must prove that its recruiting rule serves important governmental interests, *Pickering*'s requirement that the speech must be on a "matter of public concern" was satisfied by definition. *Id.* at 9. The court rejected Brentwood's argument that the recruiting rule is facially overbroad or vague, because the rule "is accompanied by the equivalent of two full pages of question-and-answer explanations and guideline interpretation." *Id.* at 20. Since "Brentwood's alleged violations are explicitly listed as prohibited conduct" in that commentary, *id.* at 19, the rule "as a whole ... gives reasonable notice of what is prohibited, especially as applied to Brentwood." *Id.* at 20. The Sixth Circuit then remanded for trial under intermediate scrutiny. *Id.* at 14-15, 21-13.

3. The district court conducted a ten-day trial, and entered judgment in Brentwood's favor on January 13, 2003. The court acknowledged TSSAA's important interests in preventing exploitation of children and keeping athletics secondary to academics, but held that TSSAA's interest in promoting a level playing field was not as important, Pet. App. 48-49, and that enforcement of the recruiting rule against Brentwood's particular actions was not narrowly tailored. *Id.* at 49-55. The court found that Coach Flatt's letter and calls "do not violate the TSSAA's legitimate governmental interests." *Id.* at 50. It found instead that the communications were "essentially post-recruiting activity" because most students who agree to enroll ultimately do attend. *Id.* at 52. The court also ruled that TSSAA violated Brentwood's due process rights. *Id.* at 65-71.

4. On appeal, a divided panel of the Sixth Circuit affirmed in all relevant aspects. Pet. App. 107, 119-20. The

panel majority held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual," *id.* at 94, and that the deferential analysis applied to the termination of public employees or contractors in cases like *Pickering* and *Umbehr* is limited to the particular types of contracts involved in those cases, *id.* at 91-93. It also treated this Court's distinction between "sovereign power" and "contractual power" in *Umbehr* as "dicta." *Id.* at 92-93. The panel held that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest ...." *Id.* at 100. It agreed that "TSSAA has substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes," *id.*, but held that "the TSSAA's use of its discretion to punish Brentwood . . . was not a narrowly tailored way to keep athletics subordinated to academics at Brentwood or ensure that the student athletes ... were not being exploited." *Id.* at 102.

In addition, despite the evidence that Brentwood was fully aware of the issues involving Bart King and had received all the process it was due under its membership contract with TSSAA, the panel found a procedural due process violation because members of TSSAA's Board of Control discussed the King allegations with TSSAA staff investigators after the hearing. *Id.* at 116-20. Although the Sixth Circuit recognized that in this context Brentwood has no due process right to decisionmakers without outside knowledge of the events, it nonetheless concluded that such discussions involved improper "*ex parte*" evidence.

Judge Rogers dissented, explaining that "[d]issatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech." *Id.* at 132. Judge Rogers would have held that "Brentwood in this case gave up its right to engage in certain types of speech." *Id.* at 134. He also explained that there was no "unconstitutional conditions"

defect in Brentwood's agreement to abide by the recruiting rule, because that rule is reasonably related to the competitive athletic program overseen by TSSAA and because the "speech" in question—being purely a matter of private concern—clearly failed the *Pickering* test. *Id.* at 138-39. Judge Rogers also noted that the majority erred by second-guessing whether Brentwood's specific violation actually threatened the substantial state interests underlying that rule. "The anti-recruiting rules, like restrictions on adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business." *Id.* at 144. Judge Rogers also disagreed with the majority's "remarkable" conclusion that competitive equity is not a substantial state interest: "it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." *Id.* at 145 n.2. Finally, Judge Rogers found no due process violation. *Id.* at 147-48.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's decision is flawed in many respects, but the unifying theme is its failure to appreciate the legal significance of the voluntary and contractual relationship between Brentwood and TSSAA. The Sixth Circuit wrongly applied stringent constitutional standards designed to constrain the use of sovereign power against unconsenting members of the general public. Those standards are inappropriate when, as here, the plaintiff agreed by contract to abide by specific rules and procedures as a condition of participating in a voluntary athletic league.

I. The Sixth Circuit held that the "applicability of the First Amendment ... does not vary depending on ... whether the relationship between the government and the speaker is voluntary or contractual." Pet. App. 94. When the government uses sovereign power to restrict the speech

rights of the general public, those restrictions are judged by stringent First Amendment standards—including the "time, place, and manner" rules applied by the Sixth Circuit here. But TSSAA has no sovereign power to impose anything on a private school, and it did not impose anything on Brentwood. The government is allowed to offer citizens a "reasonable choice" of discretionary benefits with conditions attached, that citizens are free to decline.

"Unconstitutional conditions" law is not tidy, but Brentwood cannot possibly prevail under this Court's tests, for three reasons. First, in the most analogous cases, this Court has simply enforced up-front limitations on speech required as a condition of participation in voluntary government programs. This Court enforced a CIA agent's pre-employment promise to submit any future writings to pre-publication screening—which, if imposed on the general public, would be a nakedly unconstitutional prior restraint. *Snepp v. United States*, 444 U.S. 507 (1980). It also held that the federal government can offer subsidies for family planning programs on the condition that persons speaking within the program agree that they will not discuss abortion. *Rust v. Sullivan*, 500 U.S. 173 (1991); *see also Grove City College v. Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."). Brentwood voluntarily chose to join TSSAA in order to pursue a dream of statewide athletic glory that it could not achieve by joining a smaller private league or by organizing its own independent games. It voluntarily agreed to TSSAA's conditions, one of which was that it not recruit eighth graders for athletic purposes. That condition is clearly reasonable, as demonstrated by the fact—underscored by *amici*—that public high school leagues across the country have similar rules. That should be the end of the matter.

Second, even in the absence of any express agreement or clear rules defining the scope of prohibited speech, this Court has held that public employees or government

contractors who claim to have been sanctioned because of speech have no First Amendment claim unless they can surmount an initial hurdle by proving that they were speaking "as a citizen, on a matter of public concern." That bright-line rule ensures that the government is not constantly burdened and distracted by litigation over speech that is not at the core of the First Amendment. Brentwood flunks both aspects of that categorical test. It was not speaking "as a citizen" because its speech was not abstract commentary, but active participation in the competitive athletic endeavor overseen by TSSAA, as defined by the game rules Brentwood itself agreed to. And Coach Flatt's opinion that these particular middle school students would benefit from attending Brentwood's spring football practice clearly is not a matter of any public concern.

Finally, even if Brentwood could survive those threshold requirements, this Court's cases would then require a balancing of TSSAA's legitimate interests in this area against Brentwood's interests in speaking in this particular manner. That balance clearly favors TSSAA here.

II. Even if the Sixth Circuit had been right to apply "time, place, and manner" standards, it misinterpreted the doctrine. First, the court gave far too little weight to TSSAA's substantial state interests, and wrongly discounted one of them—competitive equity—entirely. Perhaps the Sixth Circuit was confused by the "state action" posture of this case, because it is certainly true that state governments do not usually concern themselves with parity and fairness in high school sports. But if voluntary athletic leagues are to be state actors, then the principal concerns of those leagues must be considered substantial *governmental* interests as well. Reasonably balanced and fair competition is essential to all athletic contests, and particularly serves the educational interests of high school sports by encouraging participation and preventing dangerous and dispiriting lopsided contests. Since the recruiting rule is narrowly tailored to that interest, a holding that competitive equity is a substantial interest resolves this case.

The Sixth Circuit also erred by second-guessing TSSAA on whether enforcement of the rule was appropriate here. This Court has never required state actors enforcing a constitutionally justified general rule to prove that the particular violation at issue threatened the rule's purposes.

III. The Sixth Circuit's due process analysis also wrongly imports stringent constitutional standards into a contractual setting where those standards are inappropriate. Brentwood received abundant and specific notice of the nature of TSSAA's concerns and the allegations against it—notice specific enough to allow it to put on an extensive case in response. That is all TSSAA's constitution, the membership contract Brentwood signed, or due process principles require in this context. Brentwood points to a disputed allegation that TSSAA's Board may have consulted with its own investigative staff members during deliberations, and the Sixth Circuit held that any such communications were an improper "*ex parte*" communication of additional "evidence" that Brentwood lacked an opportunity to respond to. That fundamentally misconceives the nature of this hearing. Brentwood was not entitled to decisionmakers who had no prior involvement in the investigation and formed their opinions based solely on whatever was presented at the hearing itself. The hearing was an opportunity for Brentwood to tell its own side of the story, but there was no requirement that TSSAA detail all the information it had learned and might consider. The Sixth Circuit essentially accepted Brentwood's argument that it is entitled to the elaborate hearing process afforded in *Goldberg v. Kelly*, 397 U.S. 254 (1970)—including a requirement that TSSAA present and prove its own case, tender its staff for cross-examination, and base any decision solely on the evidence elicited during an adversarial hearing. This Court has never extended *Goldberg* to a context remotely like this one. Even the tenured public employee firing cases the Sixth Circuit relied upon did not go this far.

IV. Finally, TSSAA respectfully submits that this Court's prior state action analysis has proven to be

unworkable and should be reconsidered. Federal courts should not be in the business of trying to apply constitutional standards to the internal operations of voluntary high school athletic leagues that do not exercise real sovereign power. This Court can correct the Sixth Circuit's particular doctrinal errors and confusion here, but the only consistent way to spare litigants and the courts from the time and expense of cases like this one is to recognize that decisions like these are not fairly attributable to the state. This Court's "entwinement" analysis, focusing on the structure of the organization rather than on the particular action challenged, was a departure from traditional state action analysis. *Stare decisis* does not prevent this Court from restoring the prior fabric of the law after such a recent departure.

This Court's state action analysis is particularly unworkable and unfortunate in this context because subjecting athletic associations like TSSAA to constitutional litigation will do little good and plenty of harm. The public schools of Tennessee and every other state are entitled to form athletic leagues and agree upon rules for competition, including rules that restrict the speech of participants, without inviting years of litigation. The public schools themselves have no constitutional rights, and under this Court's precedents public school employees cannot complain about restrictions on "speech" in the course of performing their job duties. Public schools are under no obligation to permit private schools to join their leagues, and will not do so if it exposes them or the league to catastrophically expensive litigation. TSSAA does not have access to state financial or legal resources; its budget comes from modest dues and gate receipts at high school tournament games. This case has stretched on for nearly a decade. Its executive director escaped personal financial liability only because of a qualified immunity ruling that may not be available the next time, because of this case. And TSSAA still faces remand proceedings on an equal protection challenge and a potentially crushing fee shifting award under § 1983 if

Brentwood prevails on any of its scattershot claims. Unless this Court fashions a workable solution, the ultimate fruit of this litigation may be the end of voluntary public-private interscholastic athletic competition (or joint activities) in this country. *See* Br. of Activities Ass'ns, at 15-16.

ARGUMENT

I. THE RECRUITING RULE IS NOT AN UNCONSTITUTIONAL CONDITION

The Sixth Circuit applied intermediate scrutiny and treated TSSAA's recruiting rule exactly like a general speech restriction imposed on the non-consenting public under the state's police powers. But when restrictions implicating constitutional rights arise as conditions upon a citizen's voluntary or contractual participation in a government program or workplace, this Court has not applied heightened scrutiny. It employs "unconstitutional conditions" analysis to balance the government's legitimate interests against the individual's interest in avoiding indirect burdens on the exercise of constitutional rights.

In this Court's most recent discussion of the unconstitutional conditions doctrine, it began by acknowledging its holding in *Grove City* that conditioning federal funds on compliance with Title IX "warrant[ed] only brief consideration" because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006) ("*FAIR*") (quoting *Grove City*, 465 U.S. at 575). This Court explained that a speech-burdening condition attached to discretionary government benefits violates the First Amendment only if it "goes beyond the 'reasonable' choice offered in *Grove City* and becomes an unconstitutional condition." *Id.* at 1307.

In deciding whether conditions represent a "reasonable choice" under *Grove City* and *FAIR* or an unconstitutional burden on First Amendment rights, this Court has looked to the severity of the burden in relation to the government's

legitimate purposes,[4] the relationship between the benefit offered and the condition imposed,[5] and whether the choice is coercive.[6] In two contexts, however, this Court has found a complex balancing of factors to be unnecessary, and has instead given great deference to the government's legitimate interests in managing its operations and programs. This case implicates both of those special contexts. But under any standard, voluntary membership in TSSAA offers a "reasonable choice" as a matter of law.

First, this Court has given great deference to the government's right to define the scope of its own programs, and has recognized that citizens have no constitutional right to change the nature of discretionary programs they have voluntarily joined. A decision to participate in the government's program effectively waives any challenge to the conditions defining its scope. TSSAA and its members have made the collective decision that the recruiting rule is a central feature of the particular athletic association they are offering, and Brentwood agreed to that rule in advance. TSSAA is entitled to substantial deference concerning its own goals and mission, and to its conclusion that the

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[4] *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996) ("the inquiry is whether the [political party] affiliation requirement is a reasonable one"); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (government "may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

[5] *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (spending conditions must be "germane" to the activity being subsidized); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (condition acceptable where an "'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city") (citation omitted); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (condition unrelated to government's purpose can amount to "'an out-and-out plan of extortion'"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977), and *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (both permitting compelled payment of fees to fund activities "germane" to the programs).

[6] *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (condition not permissible because it "will have the effect of coercing the claimants to refrain from the proscribed speech").

recruiting rule is closely related to those goals and important to achieving them. So long as the rule is reasonable under that deferential standard, Brentwood's voluntary choice to join waives any challenge to the rule.

Second, this Court has identified settings, such as employment or schools, in which the government needs discretion to conduct its operations efficiently and without repeated judicial interference.[7] This Court has concluded that it is frequently reasonable—indeed essential—for the government to supervise potentially disruptive speech of its employees and contractors, and that judicial oversight is appropriate only if the speech at issue implicates core constitutional values. In such cases, this Court has held that sanctions for speech merit First Amendment review only if, at a minimum, the plaintiff was speaking "as a citizen, on a matter of public concern." That categorical rule is appropriate here, and it forecloses Brentwood's claim.

Finally, even if no special deference is due to TSSAA, the recruiting rule is nevertheless reasonable. The residual balancing test for evaluating potential "unconstitutional conditions" clearly favors TSSAA.

A. The Recruiting Rule Defines TSSAA's Program, and Brentwood's Express Agreement Waives Any First Amendment Right to Violate It

This case involves the most straightforward application of the unconstitutional conditions doctrine: a specific, upfront limitation on speech that defines the very program being offered, and to which a voluntary participant expressly consents in advance. When a speech-impacting

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[7] *Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."); *Umbehr*, 518 U.S. at 676 ("'The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer'") (citation omitted).

condition plays a role in defining the benefit being offered, and is agreed to up front, the reasonableness of the condition is entitled to great deference, in keeping with the government's right to define the scope of its own programs.

Rust v. Sullivan involved a statute authorizing an agency to make grants to family planning services subject to an up-front constraint that those funds not be used to engage in abortion-related speech. This Court noted that the challenged speech restrictions "are designed to ensure that the limits of the federal program are observed," and held that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." 500 U.S. at 193-94. Participants who chose to accept the funding were not barred from all abortion-related speech, but rather were merely required to "keep such activities separate and distinct from Title X activities." *Id.* at 196. This Court emphasized that any limitation on the plaintiffs' speech was "a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199.

This Court applied and reaffirmed *Rust* in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003). There, Congress had appropriated funds to assist libraries in providing internet research resources, with the condition that the libraries accepting funds install pornography filters on their public computers. This Court held that Congress's programs "were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes." *Id.* at 211. Congress identified the scope of the program it intended to offer, and, just as in *Rust*, "Congress may certainly insist that these 'public funds be spent for the purposes for which they were authorized.'" *Id.* at 211-12 (quoting *Rust*, 500 U.S. at 196). The "reasonable choice" requirement of *Grove City* thus was easily satisfied by a condition that defined the contours of the benefit being offered, and that was voluntarily accepted by participants.

In *Snepp*, the plaintiff was a CIA agent who "voluntarily

signed [an employment] agreement that expressly obligated him to submit any proposed publication for prior review." 444 U.S. at 510. In light of Snepp's voluntary acceptance of the restriction, this Court considered only briefly whether the restriction was reasonable and germane to the CIA's legitimate needs. This Court summarily concluded that it was "entirely appropriate," and a "reasonable means" for protecting the secrecy of sensitive information and for ensuring the "effective operation of our foreign intelligence service." *Id.*

The recruiting rule similarly operates to define and protect the contours of TSSAA's program, and was accepted by Brentwood as an up-front condition of membership. TSSAA and its member schools have made the collective judgment that a restriction on recruiting is a central component of the particular athletic program they wish to offer and compete in. That judgment is entitled to great deference. Just like in *Grove City*, Brentwood is free to avoid the recruiting limitations by simply declining membership. And (as in *Rust*) even as a member of TSSAA, Brentwood remains free to speak about athletics, recruiting, TSSAA, or even the virtues of playing football at Brentwood, in a wide variety of contexts. The Sixth Circuit noted "numerous ways in which Brentwood can get its message about athletics out to prospective students." Pet. App. 11-12. But Brentwood's "speech" inviting students still attending different schools to its football practices is a proper subject of the recruiting rules that Brentwood itself agreed to and is part of its active participation in TSSAA's athletic program, just like a coach's on-the-field challenge to a referee's penalty call. As *Rust* makes clear, Brentwood has no right to alter the basic character of a voluntary government program by participating in that program in a manner inconsistent with its purposes.

The Sixth Circuit lost sight of the fact that this case is about athletic competition, and that second-guessing sports rules can undermine the entire enterprise. The recruiting rule defines the particular competition that TSSAA's

member schools have chosen to foster and participate in. The public schools that make up the great majority of TSSAA's members have no First Amendment right to violate the rules established by the league. (Public school employees also have no individual First Amendment right to perform their jobs in a manner inconsistent with such rules. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006)). Giving Brentwood a special constitutional right to win the state football championship while violating the rules that define the parameters of competition and victory for everyone else is absurd, and deprives the prize of its meaning. This Court recognized in *NCAA v. Board of Regents*, 468 U.S. 85, 101-02 (1984), that an athletic league "would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition." Other athletic associations may have different values, but Brentwood chose to join this one; and, as with all sport rules, the rule must apply to everyone.

The Sixth Circuit also misunderstood the importance of waiver principles in this context. It is true that Brentwood's membership contract with TSSAA does not contain a specific promise not to file First Amendment litigation, but neither did Snepp's employment contract. Brentwood's contract, like Snepp's, does contain a specific promise not to speak in particular ways. This Court has consistently held that almost all constitutional rights are waivable. *E.g., United States v. Mezzanatto*, 513 U.S. 196, 200 (1995). In the criminal context, defendants voluntarily accept limitations on their fundamental constitutional rights all the time. In exchange for a lenient sentence or favorable treatment, a defendant may waive the right to a jury trial and the right against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). So long as a waiver is knowing and voluntary, *id.*, the party cannot thereafter complain that the deal was unfair. *Brady v. United States*, 397 U.S. 742, 756-58 (1970). Brentwood's express written agreement to abide by TSSAA's published rules satisfies the "knowing and voluntary" standard, and it has therefore

given up any substantive rights that could support a First Amendment challenge. Whether it also waived the right to file the lawsuit is immaterial.

Like the employee in *Snepp*, Brentwood cannot plausibly claim that it "executed this agreement under duress." 444 U.S. at 510. There is no suggestion here of coercion, and there is no genuine dispute that Brentwood is a voluntary participant in TSSAA, as its own current and former headmasters conceded at trial. *Supra*, at 5. Brentwood's voluntary participation is the epitome of the "reasonable choice" envisioned by *Grove City*. Brentwood may believe that membership in TSSAA is essential in order to achieve its own particular vision of athletic grandeur. But this Court considered and rejected precisely that argument in *NCAA v. Tarkanian*, 488 U.S. 179, 199 n.19 (1988): "The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent."[8] Any claim of compulsion is implausible, and this Court has already held that "no school is forced to join" TSSAA. *Brentwood I*, 531 U.S. at 291. In states across the country, including in Tennessee, independent schools have formed their own athletic leagues. Brentwood can as well, if other schools want to participate in its particular vision of high school athletic competition. (If they do not, Brentwood has no right to impose its own preferred values on others.)

This case involves an express, up-front agreement by Brentwood to exercise its constitutional rights in one narrow context only in a particular way, in exchange for a

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[8] *See also Grabow v. Mont. High Sch. Ass'n*, 312 Mont. 92, 98-99 (2002) ("While the consequences may weigh on a district's decision to withdraw from the MHSA, the district still remains free to do so."); *Robinson v. Kan. State High Sch. Activities Ass'n*, 260 Kan. 136, 149 (1996) ("The fact that all member schools must agree to obey the rules governing interscholastic competition, whether or not they individually agree with those rules, likewise does not establish involuntariness.").

discretionary government benefit. The only relevant questions are thus whether the restriction itself presents a "reasonable choice," and whether Brentwood's decision to accept it was voluntary and uncoerced. Under those standards, Brentwood's claim should be dismissed without any need for burdensome and disruptive further litigation over its particular factual justifications for breaking the rule. This Court did not require any such further inquiry in *Snepp*, *Grove City*, *Rust*, or *American Library Association*, and should not here. That approach is particularly fitting in the context of athletic rules. If each application of game rules requires courts to inquire into the circumstances, there will be a steady stream of time-consuming litigation, with core First Amendment values nowhere in the vicinity.

B. Brentwood's Claim Also Fails Under the *Pickering* Test

In the employment and independent contractor cases such as *Pickering*, *Connick*, *Umbehr*, and *Garcetti*, this Court has recognized that it is reasonable, and indeed essential, to ask government employees or contractors to submit to the same general managerial authority enjoyed by private employers, including sometimes sanctions for speech. This Court has held, in effect, that contractual sanctions not implicating speech delivered "as a citizen, on a matter of public concern" are categorically reasonable.

While the *Pickering* test arose in the context of government employment, it can readily accommodate this case as well. Brentwood is a party to a voluntary contractual relationship with TSSAA, and it was punished with contractual penalties for speech delivered within the confines of the contract. Even if this particular contractual relationship raises certain issues that differ from other government contracts, those differences would not warrant greater scrutiny. Brentwood's speech undermines the very nature of the program it chose to join, and that program is both particularly far from the core of First Amendment concerns and particularly likely to arouse intense passions and litigation. This Court also confirmed in *Umbehr* that

the *Pickering* test is flexible enough to accommodate a broad spectrum of voluntary contractual relationships with the government. 518 U.S. at 680. This Court recognized, for example, that there were differences between employees and independent contractors, but held that any differences "can be accommodated by applying our existing framework." *Id.* at 677. This Court noted that it had "consistently eschewed" formal distinctions such as the type of contract or the label applied to a particular contractual relationship. *Id.* at 679. This case, as with other contracting cases, merely requires an appropriate balance between the participant's interests in unfettered speech and "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *see also id.* at 152 ("a wide degree of deference to the employer's judgment is appropriate").

To succeed under the *Pickering* test, a plaintiff must first demonstrate that he is speaking "as a citizen on a matter of public concern." *Garcetti*, 126 S. Ct. at 1958. If the answer is yes, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* That two-step analysis simply implements this Court's belief that, unless the speech in question is "as a citizen on a matter of public concern," it is *always* a "reasonable choice" to ask employees or contractors to submit to ordinary workplace supervision. That judgment reflects "the common-sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, 461 U.S. at 143, and that "review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). This Court has recognized the potential for enormous litigation arising from workplace actions alleged to be retaliation for speech, and has sensibly confined such suits to circumstances that actually threaten core First Amendment values.

That same categorical analysis is appropriate here so that federal courts are not repeatedly drawn into the internal operations of voluntary athletic associations, over disputes far from the heartland of First Amendment concerns. The government as employer or contractor has a legitimate "interest in being free from intensive judicial supervision of its daily management functions." *Umbehr*, 518 U.S. at 678. Those same interests are implicated when the government operates a voluntary athletic association, which by its very nature must enforce game rules that may be arbitrary by external standards and will tend to be enforced in particularly impassioned circumstances.[9] There is no reason for Article III courts to be drawn into the internal workings of a voluntary athletic organization unless core First Amendment values are truly at stake.

Brentwood was not speaking "as a citizen, on a matter of public concern." First, Brentwood was not speaking "as a citizen," but rather as a participant in TSSAA-sponsored athletic competition. It is undisputed that, just as in *Rust*, Brentwood is free to say whatever it likes as a citizen. The Sixth Circuit noted that there were "numerous ways in which Brentwood can get its message about athletics out to prospective students," and explicitly found that "Brentwood has multiple ways of communicating with middle school students to provide them with information about the academic, athletic, and spiritual aspects of the educational experience at Brentwood." Pet. App. 11-12. The recruiting

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[9] For that reason, courts have repeatedly held that the judiciary has an exceedingly limited role to play in policing the internal operations of voluntary athletic associations. *See, e.g., Ind. High Sch. Athletic Ass'n. v. Reyes*, 694 N.E.2d 249, 256 (Ind. 1997) ("A voluntary association may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, or internal policy and management, and its right to interpret and administer the same is as sacred as the right to make them." (citation omitted)); *Fla. High Sch. Athletic Ass'n v. Marazzito*, 891 So. 2d 653, 654 (Fla. App. 2005) ("Florida courts may intervene in the internal affairs of an association such as the FHS[A]A only under exceptional circumstances.").

rule *only* implicates Brentwood's recruiting speech within the contours of its voluntary participation in TSSAA's competitive athletic program, as defined by the agreement that Brentwood signed. Just as a public employee does not speak "as a citizen" when speaking in the context of his job duties, *see Garcetti*, 126 S. Ct. at 1960, and a chess player does not speak "as citizen" when seeking prohibited outside advice in the middle of a match, Brentwood does not speak "as a citizen" when inducing particular eighth graders to attend football practice at its school, when it specifically agreed that such speech would be an aspect of athletic competition subject to game rules.

Second, the speech in question was not on any subject of public concern.[10] In this context, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). Inducing eighth graders to leave their school and attend spring football practice at a different school is not speech of general interest or concern to the public.[11] Brentwood's overall recruiting efforts at most are commercial speech, since they aim to solicit new enrollment and secure a commercial transaction. The more targeted recruiting speech at issue in this case has an even more private interest—to win football games. This Court in

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[10] The Sixth Circuit held that since TSSAA would be required to demonstrate a substantial government interest in order to survive "time, place, and manner" review, "these substantial interests will by definition implicate a 'matter of public concern.'" Pet. App. 9 (quoting *Pickering*, 391 U.S. at 573). Perhaps the Sixth Circuit misread *Pickering* as suggesting that the *government's restriction* must implicate a matter of public concern, rather than that the *citizen's speech* must implicate a matter of public concern. Its approach would turn *Pickering* on its head, and would read the "public concern" requirement out of the law. The fact that the government has substantial interests in regulating speech does not mean that that speech is necessarily on a matter of public concern.

[11] To the extent Brentwood asserts a more generalized recruiting interest in informing the public of its curricular and extra-curricular offerings, such speech of course is not implicated by TSSAA's rule.

Connick held that an employee's letter to co-workers "pertaining to the confidence and trust that [her] co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee" consisted of internal issues that did not touch a matter of public concern. 461 U.S. at 148. Coach Flatt's letter about the football practice schedule is a step removed even from *Connick*. It is certainly of no interest to anyone other than the students and their parents. *See* Br. of Nat. Sch. Bds. Ass'n ("NSBA"), at 13-15.

The Sixth Circuit believed the *Pickering* standard did not apply because "the applicability of the First Amendment to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not." Pet. App. 93. The Sixth Circuit simply confused different meanings of the word "regulatory." A public employer may "regulate" its workplace, and the agency in *Rust* "regulated" the speech of voluntary participants within the confines of its program, yet this Court has held that such "regulation" justifies an entirely different First Amendment analysis than, for example, a city's "regulation" of a public park. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (explaining why "the government's role as employer ... gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large"). This Court reasoned in *Brentwood I* that, in a sense, TSSAA has been left to "regulate" public school athletic competition in lieu of state regulation that would otherwise have been conducted by the Board of Education. 531 U.S. at 301. But that analysis could establish, at most, that TSSAA and the public school officials "entwined" with it are exercising some form of sovereign "regulatory" authority over *the public schools*. TSSAA could not be "regulating" the athletic competition of *private schools* in that same sense, because the Board of Education itself has no supervisory authority over the rules for private school competition. The Sixth Circuit's central error ultimately was its failure to recognize that TSSAA has no "regulatory" power over Brentwood other than

Brentwood's own contractual promises. And whether the authority exercised is sovereign power or merely contractual rights matters to the First Amendment analysis. This Court held that the speech restriction in *Umbehr* would have triggered strict scrutiny if imposed on the public under the state's sovereign power, but was entitled to deference when imposed pursuant to "contractual power." 518 U.S. at 678.

C. Any Balancing Test Favors TSSAA

Even if the *Rust* principle and the categorical "as a citizen on a matter of public concern" limitation were ignored, TSSAA's interests in administering its athletic program and enforcing its recruiting rule outweighs Brentwood's interest in violating that rule, and therefore still present a "reasonable choice."

The *amicus* briefs testify to the serious harms of athletic recruiting at this age, and to the importance of competitive equity. The collective judgment of TSSAA's member schools is that an anti-recruiting rule is essential to preventing exploitation of impressionable young students, ensuring the primacy of academics, and preserving a balanced playing field. This Court has "'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'" *Umbehr*, 518 U.S. at 676 (quoting *Waters*, 511 U.S. at 673). Such deference is especially appropriate here in light of the educational setting. Resolving conflicts in the context of school activities "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (citations omitted). There is no First Amendment right to speech that "would undermine the school's basic educational mission," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), and there is no reason that principle should apply with less force to the mission of a group of schools rather than an individual school. *See* Br. of NSBA at 17-19.

Brentwood's violations were unambiguous and clearly harmed the interests the recruiting rule is designed to serve. The practice invitation alone caused 12 middle school students who were not attending or enrolled at Brentwood to attend Brentwood's spring football practice—leaving their own school's extracurricular activities, and perhaps giving Brentwood an opportunity to evaluate their skills before making final decisions on financial aid packages. *Supra*, at 9 n.2. The Sixth Circuit gave far too little weight to the damage athletic recruiting does to the values of impressionable young people, *see* Br. of NFHS, at 7-9, and it improperly gave no weight at all to competitive equity. As noted, there also is great value in an athletic context to enforcing rules simply because they are rules. And the sanction imposed was far from unreasonable. Outside of a modest fine that Brentwood has never paid, it was simply a temporary exclusion from post-season tournament play.

II. TSSAA'S DECISIONS WOULD ALSO SATISFY TIME, PLACE, AND MANNER STANDARDS

The Sixth Circuit should never have applied time, place, and manner analysis. Nonetheless, TSSAA should have prevailed even under those standards, for two reasons. First, the Sixth Circuit relied on its own policy judgment that competitive fairness is not a substantial interest of a state-wide athletic association. That conclusion is directly contrary to the record evidence and common sense. Second, the Sixth Circuit held that enforcement of the recruiting rule *in this instance* did not further the interests it did think were substantial: protecting students and ensuring that athletics remain subordinate to academics. But this Court has always asked whether the *rule* is justified by substantial interests. TSSAA is entitled to enforce a constitutionally justified rule without litigation over whether the particular violation should have been considered harmless.

A. Competitive Equity is a Substantial State Interest

The Sixth Circuit held that TSSAA failed to prove that

it has any substantial interest in fostering a level playing field among its member schools, writing that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest." Pet. App. 100. That ruling is unprecedented and wrong.

"[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." Paul C. Weiler, *Leveling the Playing Field* 2 (2000). As anyone who has ever participated in athletics can confirm, competitive fairness is essential because a perception of futility undermines the entire enterprise. Children on the playground alternate picking players for teams. Every major professional sport league has a draft and restrictions on free agency, and many have salary caps or revenue sharing. All of these rules have as their primary purpose a desire to create and maintain competitive balance. *See, e.g., Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (purpose of NBA salary cap and draft restrictions is "spreading talent among the various teams"); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) ("The NFL draft, like similar procedures in other professional sports, is designed to promote 'competitive balance.'").

Competitive equity is especially important to the goals of high school athletics. TSSAA's constitution recognizes that "the primary objective of all secondary schools is to educate youth," and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." JA 134. All those goals are undermined if student athletes perceive that the deck is unfairly stacked against them or that competition is futile, and become dispirited or cease participation. And, as *amicus* NSBA explains (at 19-21), reasonably balanced teams are also important to protect students' physical safety, particularly in contact sports like football.

For these reasons, courts have repeatedly recognized (without requiring any special evidence) that competitive equity is vital to interscholastic sports. The Eighth Circuit in *Pottgen v. Missouri State High School Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994), held that a rule enforcing an age limit "helps reduce competitive advantage flowing to teams using older athletes," which was "of immense importance in any interscholastic sports program." The Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185, 187 (3d Cir. 1998), recognized that the NCAA's eligibility rules "primarily seek to ensure fair competition ... and allow for an even playing field." The Seventh Circuit upheld the NCAA's no-agent rules because they "preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992). None of these courts scoured the record for evidence that competitive equity is important. They accepted it as self-evidently important.[12] *See also* Br. of NCAA, at 20-22.

Judge Rogers's dissent had it exactly right: "the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that

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[12] *See also Chabert v. La. High Sch. Athletic Ass'n*, 312 So. 2d 343, 346 (La. Ct. App. 1975) (finding that "illegal recruiting of promising young athletes is the gravamen of this recurring problem," and that "[i]t is unarguable that any state has an interest in prohibiting such occurrences in its high schools"); *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n*, 467 N.W.2d 21, 22 (Mich. 1991) (upholding eligibility rule because it was "designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes"); *Law v. NCAA*, 134 F.3d 1010, 1023-24 (10th Cir. 1998) ("We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a marketable product...."); *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 844 (7th Cir. 1999) (recognizing "the public's interest in maintaining a level field of competition").

TSSAA needed more evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest." Pet. App. 144-45 n.2.

Regardless, the Sixth Circuit's holding that TSSAA "can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest," Pet. App. 100, simply ignores the record in this case. There are many pages of testimony speaking precisely to the point that both the perception and reality of competitive equity are essential to interscholastic athletics. CAJA 606-07, 903-05, 1163-65, 1311-12, 1350-51, 1564-65, 1571-74, 1579, 1636-38, 1657, 1668-70, 1728-32. One witness testified that "without a competitive equity ... there becomes a resentment on the part of the teams that feel that they are having to compete all of the time against better caliber teams." *Id.* at 1669. Another testified that students will not learn "that sport builds character or sport is about fair play if the play in general is not fair." *Id.* at 1730. Yet another testified that "if you do not have a level playing field, the competition cannot be fair, you can only have hard feelings result. ... When that happens, schools lose a tremendous vehicle, sports, for reaching and motivating young people...." *Id.* at 1571-72.

Although the Sixth Circuit questioned whether competitive equity is a substantial government interest, it did *not* question the record evidence demonstrating that the recruiting rule is tailored to achieve that interest.[13] Reversal of this error accordingly requires reversal of the judgment.

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[13] The court of appeals noted that "experts and Brentwood's own Headmaster Brown testified that the recruiting prohibition helps level the playing field among schools, especially as between private schools with significant resources and public schools with more limited resources and access to potential students." Pet. App. 99-100. Indeed, the Sixth Circuit's concern was that while there was ample testimony "about *how* the recruiting rule preserves competitive equity among schools," it found insufficient evidence "explaining *why* competitive equity is an important value in the first place." *Id.* at 100.

B. TSSAA Is Entitled to Enforce its Athletic Rules Without Scrutiny of Each Individual Application

Even if this Court were to find that the rule was not adequately supported by TSSAA's interest in competitive equity, reversal is still required. The Sixth Circuit also erred by focusing on the narrow facts of this case to conclude that this particular violation of the recruiting rule should have been overlooked or excused. The court found the recruiting rule generally supported by TSSAA's substantial interests in protecting students and keeping athletics secondary to academics, but nevertheless held that "there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school." Pet. App. 106.

That answers entirely the wrong question. This Court has always asked whether the *rule* is justified by substantial state interests—not whether a particular plaintiff's violation was somehow harmless. This Court held in *Clark v. Community for Creative Non-Violence* that the validity of a time, place, and manner regulation "need not be judged solely by reference to the demonstration at hand," and the government's interest in generally applying a regulation cannot be challenged by advocating for an exception. 468 U.S. 288, 296-97 (1984). And in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court rejected the argument that Ohio must prove that enforcement furthered the purposes of the rule, holding that "the absence of explicit proof or findings of harm or injury is immaterial." *Id.* at 468. Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and again in *FAIR*, this Court rejected "least restrictive means" analysis and held that a time, place, and manner regulation is not unconstitutional merely because it is overbroad by comparison to the interests it is designed to serve. The essence of Brentwood's position is that a somewhat narrower rule—one that would not reach its precise conduct here—would be less restrictive and would

still achieve TSSAA's legitimate purposes. That is precisely the argument this Court rejected in *Ward* and *FAIR*.

Since the Sixth Circuit agreed that the recruiting rule generally was justified by substantial interests, it should have held that TSSAA is entitled to enforce that rule without regard to whether this violation actually threatened the reasons for the rule. Particularly in the athletic context, referees and administrators must be able to enforce rules just because they are rules. If a referee ejects a player for speech violating a rule against "unsportsmanlike behavior," the Sixth Circuit would direct federal courts to review the phrase "unsportsmanlike behavior" for vagueness, examine the circumstances of the player's speech to see if it was "unsportsmanlike," evaluate the interests behind the rule, and determine if ejection actually promoted those interests. No athletic association could function if it bore the burden of justifying the application of its game rules in each instance of enforcement. In any event, the district court and Sixth Circuit erred by concluding that enforcement was unnecessary in this instance. *See supra*, at 33.

III. BRENTWOOD'S DUE PROCESS RIGHTS WERE NOT VIOLATED

The Sixth Circuit held that Brentwood's procedural due process rights were violated because conversations between the TSSAA Board of Control and TSSAA staff investigators somehow constituted improper consideration of "*ex parte* evidence." Pet. App. 113-20. Once again, the Sixth Circuit's analysis effectively imports due process standards designed for serious applications of sovereign power into a contractual context.

The Sixth Circuit relied on a finding by the district court that TSSAA officials Gene Menees and Bernard Childress, who participated in investigating the allegations against Brentwood, "were present during the Board of Control's private deliberations following the August 23 hearing" and "provided some information to the Board regarding their findings during the private session." Pet. App. 115-16. The

Sixth Circuit then accepted Brentwood's argument that it "should have had the chance to rebut" this "*ex parte* evidence" by "cross-examining the TSSAA investigators." *Id.* at 113. Relying on this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), it held that due process requires "notice of the evidence relied upon on penalizing Brentwood and an opportunity to respond to that evidence before the penalties were imposed." *Id.* at 119. The Sixth Circuit concluded that Brentwood did not receive such notice because it supposedly "had no notice that it should respond to the King evidence at the hearings" and "[y]et, the King evidence was used by the TSSAA in its deliberations and, under the district court's findings, influenced the penalties imposed on Brentwood." *Id.*

The Sixth Circuit's analysis muddles together several distinct issues. First, as a matter of law the court confused notice of *the issues* with notice of the specific *evidence*. TSSAA's constitution requires only that "[a]ny school charged with violating TSSAA regulations shall be notified *of such charges*" and must be given "the opportunity to present its case at a hearing" before the Board of Control. JA 141 (emphasis added). This hearing was an opportunity for Brentwood to tell its side of the story. In this context, there is nothing wrong with "*ex parte*" conversations between the Board members and TSSAA officials who participated in the investigation. Indeed, Carter participated in the investigation and the Sixth Circuit rejected the argument that there was anything improper about his participation in deliberations. Pet. App. 113. The other Board members were entitled to talk to Carter or to the investigators prior to the hearing, and may have learned various things. Such conversations do not become improper merely because they occurred after the hearing. And fair notice to Brentwood of the "the charges" against it does not require TSSAA to proffer a detailed synopsis of all such conversations. It requires notice of the *allegations*, at a level of generality specific enough to allow Brentwood to tell

its side of the story. The Sixth Circuit's reasoning effectively gives Brentwood a right to a hearing before decisionmakers who know nothing other than whatever "evidence" is elicited in the hearing and subject to cross-examination by Brentwood. Even the Sixth Circuit recognized, when discussing Carter's participation, that Brentwood is entitled to no such thing.

Brentwood got precisely the notice and process that it agreed to, and that should end the matter. Nothing in the Constitution prohibits parties from contracting for the process that will govern contractual disputes. As this Court explained in *Waters*, even "[t]he government may certainly choose to adopt other [procedural] practices, by law *or by contract*." 511 U.S. at 676 (emphasis added). Accordingly, this Court has rejected due process challenges when parties to a contract agree that arbitration will govern their disputes. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *see also D.H. Overmyer, Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) ("due process rights ... are subject to waiver" by contract); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (same). It is undisputed that Brentwood voluntarily entered into the contract and was well aware of the procedures provided. And where a plaintiff's property interest under a contract with the government "can be fully protected by an ordinary breach-of-contract suit," then so long as the state "makes ordinary judicial process available to [the plaintiff] for resolving its contractual dispute, that process is due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001); *see also Waters*, 511 U.S. at 679 ("an employee may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law"). Brentwood is free to pursue a state law breach action if it believes it did not get the notice it was entitled to. There is no reason to waste the time of the federal courts and demean the federal civil rights laws (including, most importantly here, the fee shifting provisions of § 1983) with what is at bottom a simple contract dispute.

Regardless, TSSAA's procedures, and the notice that Brentwood received, provided far more process than was constitutionally required under the circumstances. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). In light of TSSAA's "institutional needs and objectives," *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974), all that due process requires in this context is "some opportunity for [Brentwood] to present [its] side of the story" which is of "value [to TSSAA] in reaching an accurate decision." *Loudermill*, 470 U.S. at 543; *Waters*, 511 U.S. at 676-77 ("Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability."). Under due process principles, Brentwood would be entitled to a summary of the allegations against it at a level of generality sufficient to give it "a meaningful opportunity to present [its] case." *Mathews*, 424 U.S. at 349. It is not entitled to a detailed summary of every conversation or bit of information that might reach the decisionmakers. Regardless, Brentwood has never even identified any "evidence" discussed during deliberations of which it did not have notice. There is nothing related to Bart King in Gene Menees's investigative notes that was not communicated to Brentwood in Carter's July 3, 1997 letter. JA 204-11. As Judge Rogers explained, "it is unclear what evidence [TSSAA investigators] could have presented given that they did not interview Mr. King and the investigation consisted of a series of letters between Brentwood's headmaster and TSSAA." Pet. App. 148.

Brentwood's argument has always been that, under *Goldberg*, "TSSAA should have been required to present its case and make its investigators (Childress and Menees) available for cross-examination," and its decision could only be based on "evidence adduced at the hearing." Brief of Brentwood Academy, Sixth Circuit Nos. 03-5245/5278 (June 8, 2004), at 61 (quoting *Goldberg*). Although it invoked

Loudermill, the Sixth Circuit effectively gave Brentwood a right to the *Goldberg* procedures. Those standards are completely inappropriate in this contractual setting. This Court has emphasized that *Goldberg* is the *only* case in which it has ever required a hearing of that nature, and that the welfare hearings in *Goldberg*—involving a denial of "the very means by which to live," 397 U.S. at 264—"presented significantly different considerations than are present in the context of public employment." *Loudermill*, 470 U.S. at 545. If the *Goldberg* procedures are unnecessary when a tenured public employee is fired, surely they are not required here. There is no constitutional requirement that TSSAA present its own case at all, let alone every piece of information or evidence it may have gathered. *Id.* (a hearing "though necessary, need not be elaborate"). And there certainly was no requirement that the Board's decision must be based solely on the "evidence" elicited by Brentwood at that hearing. Brentwood has identified nothing that would justify this Court "depart[ing] from the ordinary principle ... that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Mathews*, 424 U.S. at 343.

Under a proper understanding of the law, the following undisputed facts establish that Brentwood had ample notice of the allegations related to Bart King and a full opportunity to tell its side of the story.

As early as May 29, 1997, Ronnie Carter asked Coach Flatt about his connection with Bart King and King's possible involvement in recruiting Jacques Curry and other students. Flatt then faxed a letter to Carter responding to the concerns. JA 120-23. On May 30, Carter sent Headmaster Brown a letter with a list of questions, including a question about King's relationship with the school and various students. JA 124-27. Brown and Robert Butler responded with a letter received by TSSAA on June 13. JA 128-33. After additional investigation, Carter sent Brown "preliminary information obtained as a result of questions concerning potential violations of TSSAA rules by

Brentwood Academy." JA 204-11. Much of the letter describes King's alleged recruiting activities directed at students and coaches at Neely's Bend Middle School, East Middle School, and others.[14] This letter stated that "[s]ince the information from Brentwood Academy to us indicates that Mr. Butler and Mr. Flatt have had contact with Mr. King, we are asking Brentwood Academy to respond to any parts of information involving these individuals." JA 210. Brentwood responded in writing on July 15. JA 212-29.

Following this exchange of letters and meetings, Carter determined that TSSAA rules had been violated and sent Brown a letter on July 29, 1997 imposing penalties. JA 238-44. One of the issues addressed was King's alleged recruiting of Jacques Curry at East Middle School. For this violation, TSSAA declared Curry ineligible for athletics at Brentwood. TSSAA also imposed a $3,000 fine due to Brentwood's violations of the recruiting rule. JA 243.

Brentwood took advantage of the process guaranteed by its membership contract by requesting an intermediate appeal before Carter and three members of the Board of Control. Carter explained at the August 13, 1997 hearing that its purpose was to give Brentwood an opportunity to explain its side of the story and supplement the information that had already been provided during the investigative process. JA 245-46. Brentwood was represented by counsel at the hearing, and to prepare it interviewed and collected sworn statements from individuals involved with the

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[14] These allegations, which were described in Carter's July 3, 1997 letter to Brentwood, included statements to two TSSAA investigators, Gene Menees and Bernard Childress, from student-athletes that if the student attended Brentwood Academy, "he would *probably* have a car" by the time he was in tenth grade. TSSAA informed Brentwood that a student at East Middle School said "Mr. King has bought his relative clothes, shoes, and jewelry and has told him that all he wants him to do is attend Brentwood Academy." Mr. King also allegedly drove students to the entrance exams at Brentwood, took another to work, and bought another a bracelet. A coach at Goodlettsville Middle School told TSSAA that King was recruiting his best athletes by promising scholarships and free transportation. JA 208-09.

allegations. These statements were submitted at the hearing, and included a five-page affidavit from King. JA 252-53. Brentwood was permitted to video-tape the hearing and a court-reporter transcribed the proceedings. In addition to live testimony, Brentwood introduced King's affidavit, and a statement from Curry. JA 253. In total, Brentwood submitted twenty-eight exhibits, including additional sworn statements, notes, and affidavits. JA 252-53. Brentwood presented evidence for four-and-a-half hours and TSSAA's deliberations lasted three hours. JA 254.

After the hearing, TSSAA modified the penalties, but Curry remained ineligible due to King's contacts. JA 254-58. Brentwood again took advantage of the contractually-guaranteed procedures and appealed to the full Board of Control. The hearing took place nine days later. Brentwood was again represented by counsel and presented the live testimony of three witnesses (including Curry), and introduced thirty-one exhibits (including King's affidavit). JA 259-62. Brentwood also played an edited version of the August 13th hearing to capture the "high points" of its prior presentation. JA 264. Brentwood presented its side of the story for two and one-half hours.

The final witness Brentwood presented was Jacques Curry. JA 264-67. Curry—who did not receive one of Coach Flatt's letters or free tickets to the game—was only relevant to the case due to his relationship with King, and one of the penalties that Brentwood was appealing to the Board of Control was the decision making Curry ineligible for athletics at Brentwood. Curry's testimony focused on his relationship with King and his decision to attend Brentwood. Brentwood's attorney said to Curry: "Now, there's been some discussion in the newspaper and otherwise about a gentleman by the name of Bart King. Would you please tell this board of control about your relationship with Bart King." JA 265. Curry was asked if King had promised a car to him, and numerous other questions about his decision to attend Brentwood and King's possible involvement. JA 265-66; *see also* CAJA 3159-73.

Immediately following Curry's testimony about King, Nebel stated: "Any other questions? That's going to be it for our proof. If I could make just a few concluding remarks. By the way, we have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear from Bart King or not. He's here if you want him." JA 267. Carter responded "No." Nebel then gave Brentwood's closing statement and the Board of Control began deliberating.

The Sixth Circuit's assertion that "evidently" that brief exchange "was the only discussion of King at the hearing," Pet. App. 115, is simply inexplicable. The purpose of Curry's testimony—immediately preceding that exchange—was to address Curry's decision to attend Brentwood and King's alleged role in that process. At trial, Brentwood's Headmaster Brown testified that, prior to the hearings, he knew and understood the charges against Brentwood, JA 452-53, as did Coach Flatt, JA 301. Flatt testified that the letters sent by TSSAA to Brentwood made clear that "supposedly this Mr. King had promised them cars and given them diamonds and everything. I mean [Carter] put those down as allegations."[15] JA 303. Tom Nebel, the attorney representing Brentwood in its hearings, was asked if he knew before attending the hearing "that the activities of Bart King were a concern to TSSAA?" Nebel responded: "Yes. I knew that TSSAA was concerned about Mr. Bart King." JA 401-02. Nebel stated that he knew enough about the allegations to prepare the extensive exhibits and to get sworn statements from Curry and other students. JA 401-03. Nebel also testified that he was not prevented from presenting any information that he wanted at the hearings.

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[15] Although Carter's July 29 letter did not mention King by name, it declared Curry ineligible solely due to his recruitment by King, as cited in prior letters. JA 238-44. Brentwood then obtained and submitted King's affidavit and Curry's statement in order to respond to the King allegations at the hearing, and Carter's August 14 letter continued to declare Curry ineligible. JA 254-58.

JA 396-401. Brentwood was aware of the King allegations throughout the process.

Brentwood received all the notice and process it was entitled to under the contract and the Constitution.

IV. *BRENTWOOD I* SHOULD BE RECONSIDERED

The Court acknowledged in *Brentwood I* that TSSAA's enforcement of its recruiting rule did not precisely fit any of the traditional state action doctrinal categories, but nonetheless concluded that TSSAA was a state actor based on its "entwinement" with state officials. That entwinement analysis is difficult to square with prior precedent and has confused lower courts and demonstrated its unworkability. It may even have contributed to the Sixth Circuit's misunderstanding of substantive First Amendment law, by losing sight of the traditional focus on the *specific conduct complained of* in favor of an undue emphasis on the overall relationship between the actor and the State. TSSAA respectfully believes that this Court should reconsider.

This Court's state action precedent has always focused on "the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "[C]areful attention," therefore, must be paid "to the gravamen of the plaintiff's complaint" to "assure that constitutional standards are invoked only when ... the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* at 1003-04. *Brentwood I*, however, looked principally to the "structure of the association," and asked whether the state "can sensibly be seen" as "entwined" in that structure. 531 U.S. at 299. That entwinement inquiry provides no full answer to the traditional ultimate question: whether TSSAA's enforcement of the recruiting rule against Brentwood "can fairly be attributed to the State," *Blum*, 457 U.S. at 1004, because the state "provided a mantle of authority that enhanced the power of [TSSAA]," *Tarkanian*, 488 U.S. at 192; *cf. Blum*, 457 U.S. at 1013 (Brennan, J., dissenting) (question is whether the defendant brought "the force of the State to bear" against the

plaintiff). Of course everything that the state itself does is state action. But for private actors with some connection to the state that raises concerns, this Court has always examined the particular conduct or functions challenged. *See* Br. of NCAA, at 10-12.

Regardless of TSSAA's structure or the composition of its Board, the specific conduct complained of here—its enforcement of the recruiting rule against Brentwood—is not fairly attributable to the state under *Blum* and this Court's other prior state action precedents. Even if the state authorized TSSAA to "regulate" athletic competition among its own public schools in some sense,[16] and even if public school officials are "entwined" with TSSAA, TSSAA does not exercise any form of state authority over *private* schools like Brentwood. The state Board of Education has no supervisory power over private school athletics that would permit it to impose rules of athletic competition on them. TSSAA's authority to enforce its rules *against Brentwood* thus does not derive from any state power, but solely from its contractual relationship with the school. 531 U.S. at 308 (Thomas, J., dissenting); *see also Grabow*, 312 Mont. at 99 ("enforcement of [athletic association] rules is a unique power derived through mutual agreement").

The state itself also had no direct involvement in TSSAA's enforcement of the recruiting rule here. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or

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[16] On August 25, 1972, 47 years after TSSAA was formed, the State Board of Education adopted a resolution recognizing and designating TSSAA as the organization to supervise the interscholastic athletic activities of Tennessee's *public* secondary schools. While the State Board did on a few occasions thereafter take action to approve TSSAA's rules, the action was "ceremonial" since the Board had no authority to control TSSAA's operations. *E.g.*, JA 92, 110. To reflect the reality that it could not control TSSAA, the Board eventually changed its resolution simply to recognize TSSAA's role in coordinating interscholastic athletic competition, and to authorize *public* schools "to voluntarily maintain membership" in TSSAA. JA 112. Neither resolution had any impact on TSSAA's operations. And the State has never given TSSAA any power.

acquiescence of the State is not state action."); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 411 (1995) (O'Connor, J., dissenting) (no state action "unless the Government affirmatively influenced or coerced the private party to undertake the challenged action").[17] In *San Francisco Arts & Athletics v. United States Olympic Committee*, USOC's federal charter granted it exclusive use of the word "Olympic." 483 U.S. 522 (1987). When S.F. Arts promoted the "Gay Olympic Games," USOC sued. This Court held that "USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right." *Id.* at 547. The same is true here.[18]

The entwinement rationale also undermines the assumption that state action equals action "under color of law." Color of law "requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988). As in *Polk County v. Dodson*, however, TSSAA's enforcement of the recruiting rule "entailed functions and obligations in no way dependent on state authority." 454 U.S. 312, 318 (1981). And, "[w]here the

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[17] Even under the *Blum* dissent, enforcement of the recruiting rule would not qualify as state action. 457 U.S. at 1028 (Brennan, J.) ("[W]e may safely assume that when the State chooses to perform its governmental undertakings through private institutions, and with the aid of private parties, not every action of those private parties is state action. But when the State directs, supports, and encourages those private parties *to take specific action*, that is state action.") (emphasis added).

[18] *Brentwood I* cited *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), and *Evans v. Newton*, 382 U.S. 296 (1966), but neither case requires a finding of state action here. *City Trusts* involved a public state agency, and *Evans* involved a sham transfer of public land to a private trust that this Court held remained a state actor because "the tradition of municipal control had become firmly established." 382 U.S. at 300.

issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional [or other] standards ... not established by the State." *West*, 487 U.S. at 52 n.10.

This Court also misapprehended the nature and extent of the state's entwinement in TSSAA. This Court's conclusion that public school officials must be acting within the scope of their public duties when representing their institutions, 531 U.S. at 299, is also problematic in two respects. First, TSSAA is not merely an instrument furthering the uniform interests of public schools. Rather, it "serves the common need of member institutions for regulation of athletics while correlating their diverse interests." *Arlosoroff v. NCAA*, 746 F.2d 1019, 1022 (4th Cir. 1984). Second, nothing in TSSAA rules require board members to be *public* school administrators. Board members are elected from the nine athletic districts and represent *all* public and private schools in their district. 531 U.S. at 307 (dissent).

Brentwood I also found entwinement because "State Board members are assigned ex officio status to serve as [TSSAA board] members." *Id.* at 300. But TSSAA's constitution and bylaws do not mention this status; it is non-voting, CAJA 1099, and it is held by representatives of the Board of Education *and* eight other representatives from six community organizations. JA 272. No ex officio member attended either of the hearings or deliberations actually at issue here. CAJA 3084.

Brentwood I's excessive focus on the structure of the organization rather than on the nature of the specific action challenged may have contributed to the Sixth Circuit's confusion about substantive First Amendment law. The Sixth Circuit seemed to believe that because this Court described TSSAA as a "regulator" of interscholastic athletics, everything TSSAA does must necessarily be an exercise of sovereign power to be reviewed under the same constitutional standards as a statute limiting speech. (Look

for Brentwood to make the same error in its upcoming brief.) The unhappy consequence was that the Sixth Circuit reviewed a decision by TSSAA to impose penalties under its private contract with Brentwood—a decision that was not even coerced or encouraged by the state—under standards more strict than those that would have applied if the state itself had fired a state employee for the same speech.

Brentwood I has confused lower courts and has been strongly criticized by commentators. Pet. 28-29; *see also* Br. of NCAA at 13-15. When a decision departs from precedent and confuses lower courts, this Court has not hesitated to revisit it. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling decision at later stage of same litigation).[19] By overruling a recent decision that "itself *departed* from ... prior cases—and did so quite recently," this Court does "not depart from the fabric of law; [it] restore[s] it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233-34 (1995) (O'Connor, J.). This Court should reaffirm the doctrine's focus on the specific action complained of. "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Id.* at 231.

CONCLUSION

The judgment of the court of appeals should be reversed, and this Court should direct the entry of judgment in favor of TSSAA on Brentwood's First Amendment and Due Process claims.

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[19] *See also United States v. Dixon*, 509 U.S. 688 (1993) (overruling recent decision that "contradicted an unbroken line of decisions"); *Solorio v. United States*, 483 U.S. 435, 450-51 (1987) (overruling decision with "doubtful foundations" and "novel approach" which must "bow to the lessons of experience and the force of better reasoning"); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977) (overruling case that "was an abrupt and largely unexplained departure" and was "the subject of continuing controversy and confusion").

Respectfully submitted,

RICHARD L. COLBERT
COLBERT & WILBERT, PLLC
108 FOURTH AVENUE SOUTH
SUITE 209
FRANKLIN, TN 37064
(615) 790-6610

THOMAS R. MCCOY
VANDERBILT LAW SCHOOL
131 21ST AVENUE, SUITE 207
NASHVILLE, TN 37203
(615) 322-2711

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200